IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1507

SAMUEL H. SLOAN,

Petitioner,

-against-

SECURITIES & EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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SECURITIES & EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit dated October 15, 1975 in which the petition for review of orders of suspension of trading in Canadian Javelin Ltd. was dismissed without prejudice and the subsequent decision and orders dated January 21, 1976 in which the petition for rehearing and the suggestion that the rehearing be in banc was denied.

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OPINION BELOW

The opinion of the Court of Appeals below has been reported as *Sloan v. S.E.C.*, 527 F.2d 11 (2d Cir. 1975). A copy of the official report is included as Appendix A to this petition. This opinion dismissed without prejudice a petition for review of various orders of the Securities & Exchange Commission in which trading in Canadian Javelin Ltd. was suspended for successive ten day periods.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on October 15, 1975. A petition for rehearing and a suggestion that the rehearing be in banc was denied on January 21, 1976. A copy of these last two decisions are included as Appendix B and Appendix C to this petition. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The time within which to apply for a writ of certiorari to bring this proceeding before the Supreme Court for review is ninety (90) days from January 21, 1976 pursuant to 28 U.S.C. §2101(c).

QUESTIONS PRESENTED

1. Is Section 12(k) of the Securities Exchange Act of 1934 (15 U.S.C. §781(k)), which gives the Securities & Exchange Commission the statutory authority summarily to suspend trading in any security, unconstitutional?

2. Are the current suspensions of trading in Canadian Javelin Ltd. illegal in that Section 12(k) of the Securities Exchange Act of 1934 only gives the Securities & Exchange Commission the authority to suspend trading in a security for a period not to exceed ten (10) days whereas here the Securities & Exchange Commission has suspended trading

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in Canadian Javelin Ltd. for more than two years?[1]

3. Is the existance of the Securities & Exchange Commission, which is not part of the Legislative, Executive or Judicial branches of the Government but is part of the so-called "Fourth Branch" of the Government and which possesses plenary powers of all three including the power to suspend trading in a security, repugnant to the Constitution?

4. Must the suspension orders be vacated because the Securities & Exchange Commission has given no reason for its suspensions and the suspensions are not supported by substantial evidence or, for that matter, by any evidence?

CONSTITUTIONAL PROVISIONS INVOLVED

Article 1, Section 1 states:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

Article 1, Section 8, Clause 3 states:

> "Congress shall have the power. . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Article II, Section 1 states:

> "The executive power shall be vested in a President of the United States of America."

1. Trading in Canadian Javelin Ltd. has been suspended on four distinct occasions. The first suspension started on March 17, 1971 and terminated on April 5, 1971. The second suspension was from March 7, 1972 until August 9, 1972. The third was from November 29, 1973 until January 26, 1975. The current suspension started on April 30, 1975 and continues to the present. Although Sloan's original petition for review sought review of the suspension orders which were then current it is obvious that if one "series" of suspensions is illegal, then every order including the current orders are illegal.

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Article III, Section 1 states:

> "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress may, from time to time, ordain and establish."

The Fifth Amendment, in pertinent part, states:

> "No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

The Tenth Amendment states:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS INVOLVED

Securities Exchange Act of 1934, §12(j), 15 U.S.C. §78 1(j) states:

> [Suspension or Revocation of Registration of Security]
>
> "(j) The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of,

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any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence."

Securities Exchange Act of 1934, §12(k), 15 U.S.C. §78 1(k) states:

"[Suspension of Trading of Security]

(k) If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding ninety days. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale or, any security in which trading is so suspended."

Securities Exchange Act of 1934, §25(a), 15 U.S.C. §78y(a) states:

"Court Review of Orders and Rules

Sec. 25. (a)(1) A person aggrieved by a final order of the Commission entered pursuant to this title may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

[Procedure After Filing of Petition]

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated by the

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Commission for that purpose. Thereupon the Commission shall file in the court the record on which the order complained of is entered, as provided in section 2112 of title 28, United States Code, and the Federal Rules of Appellate Procedure.

[When Jurisdiction Becomes Exclusive]

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.

[When Findings Conclusive]

(4) The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

[Additional Evidence]

(5) If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order.

Securities Exchange Act of 1934, §25(c), 15 U.S.C. §78y(c) states:

[Objection Not Previously Made]

(c)(1) No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.

[When Order or Rule May Be Stayed]

(2) The filing of a petition under this section does not operate as a stay of the Commission's order or rule. Until the court's jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires. After the filing of a petition under this section, the court, on whatever conditions may be required and to the extent necessary to prevent irreparable injury, may issue all necessary and appropriate process to stay the order or rule or to preserve status or rights pending its review; but (notwithstanding section 705 of title 5, United States Code) no such process may be issued by the court before the filing of the record or the materials set forth in subsection (b)(2) of this section unless: (A) the Commission has denied a stay or failed to grant requested relief, (B) a reasonable period has expired since the filing of an application for a stay without a decision by the Commission, or (C) there was reasonable ground for failure to apply to the Commission.

[Jurisdiction Where District Court Enforcement Proceeding Also Pending]

(3) When the same order order or rule is the subject of one or more petitions for review filed under this section and an action for enforcement filed in a district court of the United States under section 21(d) or (e) of this title, that court in which the petition or the action is first filed has jurisdiction with respect to the order or rule to the exclusion of any other court, and thereupon all such proceedings shall be transferred to that court; but, for the convenience of the parties in the interest of justice, that court may thereafter transfer all the proceedings to any other court of appeals or district court of the United States, whether or not a petition for review or an action for enforcement

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was originally filed in the transferee court. The scope of review by a district court under section 21(d) or (e) of this title is in all cases the same as by a court of appeals under this section.

STATEMENT OF THE CASE

This case presents a petition for review of various orders of the Securities & Exchange Commission ("S.E.C.") in which trading in Canadian Javelin Ltd. was suspended. In June, 1974, the petitioner, Samuel H. Sloan ("Sloan"), instituted suit in the United States District Court for the Southern District of New York for declaratory relief declaring the S.E.C.'s power to suspend trading in securities to be unconstitutional, *Sloan v. S.E.C.* 74 Civil 2792.[2] The S.E.C. interposed as an affirmative defense the claim that the S.E.C. could not be sued (citing *Blackmar v. Guerre* 342 U.S. 521 (1952) and *Holmes v. Eddy* 341 F. 2d 447 (4th Cir. 1965)) and asserted that Sloan's "exclusive remedy" was to file a petition for review of the suspension orders in the United States Court of Appeals. As a result, Sloan did in fact file such a petition for review on November 8, 1974. A copy of this petition is included as Appendix D to this petition. Briefs were filed and the result was the decision to which certiorari is now sought. At the same time, Sloan continued to pursue his district court case which ultimately resulted in a decision by the United States Court of Appeals for the Second Circuit dated March 4, 1976. That recent decision is included as Appendix E to this petition.[3]

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2. The fact that suit was pending was noted by Judge Lloyd F. MacMahon in *S.E.C. v. Canadian Javelin Ltd.*, 64 F.R.D. 648, 651 (S.D.N.Y. 1974). That decision also deals with Sloan's "extensive transactions" in Canadian Javelin Ltd. stock.

3. Sloan has since filed a petition for rehearing of that decision. However, it is obvious from the language of that decision that no relief is likely to be

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The opinion of October 15, 1975 dismissed Sloan's petition "without prejudice." Promptly thereafter, Sloan wrote to the S.E.C. and "demanded" a hearing. The reply of the S.E.C., which came approximately one month later, indicated that Sloan should supply an affidavit setting forth facts which he intended to prove at such a hearing. On March 6, 1976 Sloan supplied such an affidavit. A copy of this affidavit is included as Appendix F to this petition. As of this date no response has been received from the S.E.C. Meanwhile, the S.E.C. has continued to suspend trading in Canadian Javelin Ltd. for every ten days until the present. These trading suspensions are reported regularly in the Federal Register. The suspension in effect as of the date of this petition is scheduled to expire on April 22, 1976.

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forthcoming from that court. As a result, it is likely that in the near future Sloan will be filing in this court a petition for a writ of certiorari to that decision as well as to all of the appeals listed in that decision. (In all of the other appeals, petitioners for a hearing and/or reconsideration are presently pending.) That petition, however, to the extent that it deals with trading suspensions will not request immediate review of the constitutional questions involved but rather will contend that under *Goosby v. Osser*, 409 U.S. 512, 518 (1973) the district court erred in refusing to convene a three judge court because the constitutional questions presented by Sloan are not frivolous (or, if not frivolous, should have been resolved in Sloan's favor). In effect, the case presented here seeks *inter alia* declaratory relief declaring the exercise of the suspension power to be unconstitutional whereas in the district court case Sloan also seeks an injunction against the S.E.C. The distinction between declaratory and injunctive relief can be seen from *Steffel v. Thompson*, 415 U.S. 452, 466 (1974). The necessity for parallel lawsuits is made evident from page 11 of the brief filed in this case by the S.E.C. in the court of appeals which stated:

> "Congress made no express provision for review of orders suspending trading. In view of the short duration of each suspension order, court review of these orders was probably never contemplated by Congress. This is not to say that in an appropriate case judicial review could not be had. But whether such a suspension order would be reviewed in a district court, pursuant to the review provisions of the Administrative Procedure Act, or in a Court of Appeals, pursuant to the specific provisions of Section 25 of the Exchange Act is not clear. This question, however, need not be resolved here. . . ."

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REASONS FOR GRANTING THE WRIT

The importance of the questions presented by this petition for a writ of certiorari should be obvious to any person who is familiar with the S.E.C.'s often heavy handed attempts to regulate and indeed control all securities trading whether or not commerce with foreign nations and among the several states is involved. The petitioner contends that all summary suspensions of trading are unconstitutional. The petitioner further contends that the practice of the S.E.C. to "continue" indefinitely a suspension of trading by suspending trading in a security for successive ten day periods is not only unconstitutional but is illegal in that it is a direct violation of Section 12(k) of the Securities Exchange Act of 1934 which gives the S.E.C. the power to suspend trading in a security "for a period not exceeding ten days." Furthermore, the petitioner contends that the Court of Appeals was in error in failing to resolve these and other constitutional and legal questions presented by Sloan or, to the extent that it resolved them, in resolving them against Sloan.

Since the Court of Appeals itself correctly notes that questions raised by Sloan have "never been judicially considered" it is submitted that they are of such importance as to require plenary consideration with briefs on the merits and oral argument for their resolution.

ARGUMENT

Although the S.E.C. acquired the power to suspend trading in a security in 1934, it was ten years before it first exercised this power. See 5 L. Loss Securities Regulation 2816 (Supp. to 2d. ed. 1969). However, in the past few

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years the S.E.C. has suspended trading in hundreds of securities and it is fair to state that the exercise of the suspension power has become nearly routine. Needless to say, this state of affairs invites political abuse.

To cite a few examples, on April 11, 1974 the S.E.C. simultaneously suspended trading in all securities of a total of 48 different issuers. Exchange Act Release No. 10732 dated April 11, 1974. Each of these issuers were apparently small corporations which had failed to file a report as required by S.E.C. rules and consequently had failed to pay the fee required by S.E.C. Rule 12b-7, 17 C.F.R. 240.12b-7, a fee which, incidently, was impliedly declared illegal in *Federal Power Commission v. New England Power Co.* 415 U.S. 345, 350 n. 4 (1974). However, trading suspensions have not been limited to small corporations. On November 20, 1974 the S.E.C. suspended trading in all securities of American Telephone & Telegraph Co. Exchange Act Release No. 11111 dated November 20, 1974. On January 24, 1975 the S.E.C. suspended trading in all securities of International Business Machines Corp. Exchange Act Release No. 11208 dated January 24, 1975. This latter suspension had the presumably unanticipated result of causing losses to persons who held options to purchase shares of International Business Machines Corp. which expired while the suspension of trading was in effect. A lawsuit which thereafter resulted had a decision reported as *Piemonte v. Chicago Board Options Exchange*, 405 F. Supp. 711 (S.D.N.Y. 1975).

The suspensions just named terminated in ten days or less. However, holders of suspended securities have not always been so fortunate. The longest suspension currently in effect is that of Continental Vending Machines Corp. which was commenced on March 8, 1963 and continues the

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present day. A number of other current suspensions have been in effect for a period of one year or more. Thus it would be correct to say that the exercise of the S.E.C.'s suspension power has adversely affected the property rights of millions of investors. Canadian Javelin Ltd. alone has more than 12,000 stockholders, approximately 75% of whom are United States residents.[4]

There is nothing in the record of this proceeding which shows that the suspensions in question were justified. Indeed, the "record" filed by the S.E.C. consists of nothing more than certain suspension orders along with a number of excised "non-public" memorandums which, according to the S.E.C., gave the reasons for the trading suspensions. However, none of the memorandums were signed and many of them consisted of blanked out sheets of paper which presumably had contained material that the S.E.C. did not want the Court of Appeals to read. Most of the suspension orders themselves were not signed and in some cases they appear to have been initialed by some unauthorized person and not by the Secretary of the Securities & Exchange Commission.

It is submitted that there can be no doubt that the exercise of the suspension power is unconstitutional.

> "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803).

However, with respect to suspension orders, the S.E.C. was forced to concede at oral argument before the Court of Appeals that there is no remedy in the case of a stock which

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4. This fact was alleged in the complaint in *S.E.C. v. Canadian Javelin Ltd.*, 73 Civil 5074 (LFM) (S.D.N.Y.) ¶6 and was admitted in the answer of Canadian Javelin Ltd. This fact was also alleged in various excised memorandums which the S.E.C. included in the record of this case.

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has been wrongfully suspended. This would seem to operate as a concession that the suspension power is unconstitutional for, as the Supreme Court stated in *Garfield v. Goldsby*, 211 U.S. 249, 262 (1908),

> "[T]here is no place in our constitutional system for the exercise of arbitrary power."

The Court of Appeals, in its decision of October 15, 1975, recognized the constitutional problem created by the lack of a remedy but resolved it in an unusual and erroneous manner. It stated that Sloan would be given the opportunity to present his arguments to the S.E.C. in order to satisfy "any possible exhaustion requirement" while expressly declining to decide whether any exhaustion requirement in fact existed. In accomplishing this result, the Court of Appeals misstated the law. Footnote 1 of the court's opinion states that the recent Securities Acts Amendments of 1975 "gives the S.E.C. the new power to suspend trading in a stock for up to one year, after notice and a hearing." However, this is not the case. The section in question, §12(j) (15 U.S.C. 78 1(j)), only gives the S.E.C. the power to suspend the *registration* of a security. Furthermore, this section is not new. Previously, this power existed under Section 19(a)(2) of the Securities Exchange Act. (15 U.S.C. 78s(a)(2)). In the Securities Acts Amendments of 1975 Congress somewhat altered §19(a)(2) and moved it over to become the new §12(j).

Actually, Section 12(j) is irrelevant to this proceeding because the S.E.C. bases its suspensions of Canadian Javelin Ltd. not on that section but on Section 12(k). Moreover, since 1934 the S.E.C. has had the power to suspend the registration of a security after notice and a hearing and apparently has never exercised that power.

In effect, what the Court of Appeals did was to instruct

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the S.E.C. to create a new judicially mandated administrative remedy where none presently exists by statute, S.E.C. rule, or S.E.C. practice or policy. Perhaps the Court of Appeals did this with the idea of "saving" the constitutionality of the otherwise unconstitutional suspension power. It is obvious from *Fuentes v. Shevin*, 407 U.S. 67, 90-93 (1972) and many other cases that summary governmental action affecting property rights is unconstitutional unless an immediate hearing is available and even then only in "extraordinary situations" which are not present here.

However, assuming that the S.E.C. creates a new administrative remedy, which it has yet to do and which Congress has given it no authority to do, the suspension power is still unconstitutional. To begin with, Sloan is put in the position of asking the Securities & Exchange Commissioners to declare that their own prior actions were illegal. The probability of risk of bias in such a proceeding is too high to be constitutionally tolerable. *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). Moreover, in a recently decided administrative proceeding involving Sloan which, incidently, lasted more than three years, the S.E.C. expressly stated that it would not pass on any constitutional questions presented by Sloan. *Samuel H. Sloan*, Securities Exchange Act Release No. 11376 n. 23 (April 28, 1975). Surely the Constitution does not permit the S.E.C. to tie up Sloan in a futile administrative proceeding which might take years to resolve while new suspension orders are issued every ten days. Furthermore, neither Congress nor the Constitution has given the S.E.C. the general power to conduct inquisitions, see *Jones v. S.E.C.*, 298 U.S. 1, 25-26 (1936), and the creation of a judicially mandated administrative remedy is likely to have the result of giving the S.E.C. more power than Congress intended.

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In any event it is clear that there is no exhaustion requirement. There is no need for Sloan to be required to try to institute a new administrative proceeding in order to "urge his objections before the Commission" because, as noted previously, essentially identical objections were urged before the Commission in another administrative proceeding involving Sloan and were rejected. Therefore, there is no necessity for resubmitting these same objections. *Crancer v. Lowden*, 315 U.S. 631, 635 (1942). Moreover, long ago, *In the Matter of Red Bank Oil Co.*, 21 S.E.C. 695, '45-'47 CCH Dec. ¶75,610, the S.E.C. stated that it interpreted the Securities Exchange Act of 1934 as giving it the effective power to suspend trading in a security indefinitely. In light of this and in light of the repeated use and abuse of the arbitrary suspension power, nothing more than further delay could be expected to result from requiring Sloan to resubmit his claim to the S.E.C. that the S.E.C. had deprived Sloan of due process.

In addition, Sloan is contending that the administrative procedure itself is unconstitutional. This raises a question which is beyond the competence of the administrative agency to hear and determine. *Oestereich v. Selective Service System Board*, 393 U.S. 233, 242 (1968). See also *Public Utilities Commission v. United States*, 355 U.S. 534, 539 (1958); *Radio Corporation of America v. United States*, 358 U.S. 334, 346 (1956); *United States v. Western Pacific R. Co.*, 352 U.S. 59, 63-64 (1956). The S.E.C., in the matter of *Samuel H. Sloan, supra*, concurred on this point.

It should be obvious that a suspension of trading is a reviewable order within the meaning of the Administrative Procedure Act 5 U.S.C. §551(6) in spite of claims by the S.E.C. that there is doubt on the matter. Compare *Chicago v. United States*, 396 U.S. 162, 166 (1969) (agency decision

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to terminate investigation); *Abbott Labs v. Gardner*, 387 U.S. 136 (1967) (promulgation of regulation by FDA); *Tooahnippah v. Hickel*, 397 U.S. 598 (1970) (disapproval of will); *Oestereich v. Selective Service System Board, supra* (revocation of draft exemption); *NBC v. United States*, 319 U.S. 190 (1943). Any other claims by the S.E.C. that there is irregularity in this proceeding are resolved by the Declaratory Judgment Act, 28 U.S.C. §2201, and thus no barrier exists to a resolution of the constitutional questions. If the Court of Appeals felt that it was necessary for there to be an evidentiary hearing in order to establish a record upon which to base its determination of the constitutional question, it could and should have transferred this case to a district court in accordance with Section 25(c)(3) of the Securities Exchange Act of 1934, 15 U.S.C. §78y(c)(3), with appropriate instructions rather than try to force the S.E.C. to give Sloan a hearing.

Clearly, the claim presented by the S.E.C. to the Court of Appeals that this controversy is moot because the particular ten day suspension orders of which Sloan sought review had expired by the time briefs were filed has no merit since this controversy clearly involves the type of "short term orders capable of repetition, yet evading review" which were held to be reviewable after they expired in *Southern Pacific Terminal v. ICC*, 219 U.S. 498, 515 (1911) discussed in *Sosna v. Iowa*, 419 U.S. 393, 399-403 (1975).

The opinion of the Court of Appeals states that Sloan's "blunderbuss" constitutional attack is "frivolous." Its subsequent opinion found in Appendix E adhered to that view. Thus the constitutional questions involved are ripe for review by this court and moreover should be reviewed by this court since they will not survive agency review. In

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addition, the more recent Court of Appeals decision has warned Sloan not to raise these constitutional questions again in that court. However, since neither of the Court of Appeals decisions states with particularity what Sloan's constitutional claims were, they should be summarized here.

Sloan contends that the grant by Congress of the suspension power constitutes an unconstitutional delegation of a combination of legislative, executive and judicial powers. It has been established that Congress cannot delegate its legislative power *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1936); *National Cable Television v. United States*, 415 U.S. 336, 342 (1974). Under the definition set forth in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908) a suspension of trading in a security is "legislation." Hence, the suspension power is unconstitutional when exercised by the S.E.C. or by any entity other than Congress. The suspension power also constitutes a sort of roving commission to see a wrong and correct it. With respect to trading suspensions, Congress has declared no policy, has established no standard, has laid down no rule and therefore under *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935), the suspension power is unconstitutional. No valid governmental purpose is served by a trading suspension since it involves interference in what would otherwise be a perfectly legal business transaction between a willing buyer and a willing seller. This distinguishes a trading suspension from the type of governmental activity involved in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 66 (1974) and other cases cited by the S.E.C. which permitted the postponement of notice and a hearing when "necessary to protect the public from contaminated food, from

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misbranded drugs, to aid the collection of taxes or to aid the war effort." 465 U.S. at 697 (citations omitted). In addition, even if a hearing were available before the S.E.C., which it is not, the results of the hearing "can no more relieve the consummated oppression than it can unring a bell." *NLRB v. Duval Jewelry Co.*, 357 U.S. 1, 9 (1958) (Whittaker J., concurring). Moreover, since there is no compelling governmental interest involved, trading suspensions are not permitted by the constitution.

The suspension power violates the Fifth Amendment and other provisions of the Constitution and, in addition, violates the Tenth Amendment by passing legislation in an area reserved to the states. *Kansas v. Colorado*, 206 U.S. 46, 90 (1907). Indeed, it can even be argued that a securities transaction does not constitute commerce and therefore Congress lacks the power to legislate in this area. See *Paul v. Virginia*, 75 U.S. 168 (1868) modified in *United States v. South-Eastern Underwriters Association et al.*, 322 U.S. 533 (1944). Here, it should be noted that an S.E.C. suspension of trading makes illegal all trading of a security regardless of whether or not "commerce among the several states" is involved. It is submitted that under the constitutional concept of federalism, this is unconstitutional.

A further point should be made concerning the fact that the Court of Appeals is clearly in error at the most significant point of its opinion. The Court of Appeals stated that the S.E.C. was willing to give Sloan "some sort of administrative hearing" 527 F. 2d at 12. This was not the case. The S.E.C. never stated that it was willing to give Sloan an administrative hearing and the opinion of the Court of Appeals can perhaps be characterized as an attempt to force the S.E.C. to give Sloan a hearing in what

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the Court of Appeals misperceived to be a way to "avoid" the constitutional question or to "save" the constitutionality of the statute. The argument presented by the S.E.C. to the Court of Appeals on this subject can be found at a section of its brief entitled "Petitioner has failed to exhaust his administrative remedies." The two pages the S.E.C. devoted to this argument were summed up in the last paragraph where the S.E.C., on page 17 of the brief, stated:

> "While there is no specific procedure for review of suspension orders, the Petitioner could have written to the Commission or filed a petition with it presenting his views. The failure of Petitioner to have attempted to obtain Commission consideration of the views which he asks this court to adopt requires that his petition for review be denied."

Actually, as Sloan pointed out in his reply brief, he had written to the Commission nearly two years earlier and had requested a hearing concerning Canadian Javelin Ltd. and the Commission had not even replied to his letter. However, the significant point is that the S.E.C. never stated either in the brief or at oral argument in the Court of Appeals that it was willing to grant Sloan "some sort of administrative hearing" and consequently the opinion of the Court of Appeals is clearly erroneous.

If this Court does not grant the requested writ it will not only foreclose Sloan's constitutional claims but it will probably preclude any possible constitutional challenge to the suspension power by litigants. Sloan is apparently the first and, to date, the only person to raise this question although, as noted previously, the suspension power has adversely affected the property rights of millions of investors. Although innumerable other individuals

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theoretically possess the requisite standing to challenge the suspension power, Sloan finds himself in circumstances which are probably nearly unique and it is unlikely that anyone else will follow the course he has taken. As a registered broker dealer in securities, Sloan specialized in making markets in over-the-counter stocks and bonds. On twenty-eight occasions, the S.E.C. has suspended trading in securities where Sloan was a market maker.[5] In addition, the S.E.C. has sued Sloan twice and has prosecuted an administrative proceeding against Sloan and the exercise of the S.E.C.'s power to suspend trading in a security is involved in all three of these proceedings although indirectly. Thus, Sloan has much at stake. He has been aggrieved in the past and will in all likelyhood continue to be aggrieved in the future by S.E.C. suspension orders and therefore the fact that he presently owns 13 shares of Canadian Javelin Ltd. stock and would like to buy more or perhaps make sales if the price of Canadian Javelin Ltd. shares gets high enough[6] is not the entire reason that Sloan is prosecuting this case. At the same time, Sloan clearly has standing to challenge the specific suspension orders in question.[7]

One final point should be made concerning the course of the proceedings in the Court of Appeals. The S.E.C. there made all of the arguments that could have been made regardless of how contradictory or unmeritoreous they

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5. This fact was alleged in the amended complaint filed by Sloan in *Sloan v. S.E.C.*, 74 Civil 2792 and the dates of the suspensions and the securities involved were set forth with particularity.

6. Canadian Javelin Ltd. is currently being actively traded at about $2.00 per share on the Montreal Stock Exchange.

7. A remarkable and somewhat scandalous S.E.C. staff opinion letter, which nevertheless demonstrates Sloan's direct economic interest in the suspension orders in question, has been recently published as CCH Fed. Sec. Law Rep. ¶80,417.

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might be. The S.E.C. argued that the controversy was "moot" whereas clearly the controversy was not moot. It argued that Sloan lacked standing to challenge the orders in question whereas clearly if anyone has standing, Sloan has. It argued that Sloan had failed to exhaust his administrative remedies where no administrative remedies exist. It also asserted in its brief a great variety of charges of wrongdoing on the part of Canadian Javelin Ltd. and its officers whereas none of these charges were supported by evidence and many of them did not even find support in the unsigned memorandums proffered as proof by the S.E.C. This is why the Court of Appeals said in the fourth paragraph of its decision, "The record is unclear on this point." What the Court of Appeals should have said is that there is nothing in the record on this point. Likewise, with respect to the parallel district court case, the S.E.C. in its brief filed in the Court of Appeals, raised the "jurisdictional question" (brief of S.E.C. in 75-7283, p. 11) and devoted two pages to the argument that the S.E.C. is immune from suit. Sloan was required to respond to this argument. Therefore, the criticism leveled at Sloan by the Court of Appeals in footnote 5 of its March 4, 1976 opinion was unfair and unwarranted. In short, Sloan should not be criticized for his "blunderbuss attack" but rather the S.E.C. should be critized for its blunderbuss and generally frivolous defense.

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CONCLUSION

For all of the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Samuel H. Sloan
917 Old Trent's Ferry Road
Lynchburg, Virginia 24503
(804) 384-1207
(212) 299-2095

DATED: April 14, 1976.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 98—September Term, 1975.

(Argued September 26, 1975 Decided October 15, 1975.)

Docket No. 74-2457

SAMUEL H. SLOAN,

Petitioner,

—against—

SECURITIES & EXCHANGE COMMISSION,

Respondent.

Before:

MOORE, MULLIGAN and VAN GRAAFEILAND,

Circuit Judges.

Proceeding to review legitimacy of series of S.E.C. orders suspending trading in the stock of a certain corporation.

Dismissed without prejudice.

SAMUEL H. SLOAN, Pro Se, Lynchburg, Virginia, *for Petitioner.*

MICHAEL J. STEWART, Assistant General Counsel, Securities & Exchange Commission, Washington, D.C. (Lawrence E. Nerheim, General Counsel, David Ferber, Solicitor, Thomas L. Taylor III, Attorney, Securities and Ex-

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change Commission, Washington, D.C.), *for Respondent.*

PER CURIAM:

Samuel H. Sloan, plaintiff-appellant pro se, no stranger to this court, instituted this action essentially to protest a series of SEC suspension-of-trading orders imposed on the stock of Canadian Javelin, Ltd. ("CJL"), a Canadian corporation, in which Sloan dealt extensively.

The SEC has the statutory authority summarily to suspend trading in a stock on national exchanges or in the over-the-counter markets; at the time the events in question transpired, such suspensions could run up to ten days. Formerly Securities Exchange Act of 1934 §§ 15(c)(5) and 19(a)(4), 15 U.S.C. §§ 78*o*(c)(5) and 78*s*(a)(4).[1] On November 29, 1973, the SEC issued its first ten-day suspension in CJL stock because of its finding that CJL had issued false and misleading press releases. These suspensions were issued anew every ten days, so that trading in CJL stock was suspended in an unbroken period through January 26, 1975; the following day trading was permitted to resume.

But not for long. On April 30 of the same year, the SEC again initiated a series of ten-day suspensions that has continued until the present day; this second series of suspensions allegedly was instituted to allow dissemination of information about regulatory action against CJL by Canadian authorities, although the record is unclear on this point.

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1 The relevant sections are now §§ 12(j) and (k) of the 1934 Act, 15 U.S.C. §§ 78*l*(j) and (k); these sections were added by amendment in 1975, Pub. L. No. 94-29 § 9, 89 Stat. 118 (June 4, 1975). The latter of these two sections substantially repeats the earlier ten-day suspension provisions; the former gives the SEC the new power to suspend trading in a stock for up to one year, *after* notice and a hearing.

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Sloan engaged in extensive transactions with CJL stock, including short selling, which were frustrated by the suspension orders.[2] Sloan, in addition to other actions, has initiated the instant proceeding in this court to obtain review of the suspension orders, pursuant to the 1934 Act § 25(a), 15 U.S.C. § 78y(a), as amended, 15 U.S.C. § 78y(a)(1) (Pub. L. No. 94-29, § 20, 89 Stat. 158 (June 4, 1975)).

We consider his blunderbuss attack frivolous except for his allegation that the "tacking" of ten-day summary suspension orders by the SEC for an indefinite period constitutes an abuse of that agency's authority and a deprivation of due process. Apparently this question has never been judicially considered and would seem not to be frivolous; see 2 L. Loss, Securities Regulation 854-55 (2d ed. 1961). We cannot decide it on the record before us. The record is entirely silent as to the reasons for the second series of suspensions, commencing in April of this year; we cannot tell whether they are based on substantial evidence, and hence cannot decide if they amount to an abuse of discretion by the SEC. Sloan's pleadings also cover only the *first* series of suspensions, which now have terminated. It may be that Sloan intends to challenge the series of suspensions currently in effect as well. Moreover there was no hearing (or any other proceeding) below before the SEC itself; in fact, there was at the time no formal statutory provision for any such proceeding involving suspension orders.[3] Nonetheless, the SEC on this

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2 We think therefore that Sloan satisfies the standing requirement of the 1934 Act § 25(a), 15 U.S.C. § 78y(a) (as amended in 1975, Pub. L. No. 94-29, § 20, 89 Stat. 158 (June 4, 1975)) to seek court review of these SEC orders, since he was "aggrieved" thereby.

3 We note that some sort of hearing is now required for the up-to-one-year suspensions authorized by the 1975 amendments to the 1934 Act, see note 1 *supra*. However, this requirement postdated Sloan's action here, and in any event is not applicable to ten-day suspensions.

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appeal has indicated that it is willing in fact to grant Sloan some sort of administrative hearing, thus satisfying any possible exhaustion requirement[4] while also contributing to the record we now find insurmountably sparse.

We therefore dismiss Sloan's appeal but without prejudice to his repleading after an administrative hearing before the SEC, from which judicial review may be sought.

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4 We do not suggest, nor need we decide, that such a requirement necessarily exists. But see the 1934 Act's new section 25(c)(1) (formerly § 25(a)), 15 U.S.C. § 78y(c)(1) (as amended in 1975).

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Appendix B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of January, one thousand nine hundred and seventy-six.

Present:

HON. LEONARD P. MOORE,
HON. WILLIAM HUGHES MULLIGAN,
HON. ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judges.

SAMUEL H. SLOAN,
Petitioner,

v. *Docket No. 74-2457*

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

A petition for a rehearing having been filed herein by counsel for the petitioner,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

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Appendix C

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of January, one thousand nine hundred and seventy-six.

SAMUEL H. SLOAN,
Petitioner, *Docket No. 74-2456*

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

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Appendix D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL H. SLOAN,

Petitioner,

-against-

SECURITIES & EXCHANGE COMMISSION

Respondent.

PETITION FOR REVIEW

Samuel H. Sloan hereby petitions the court for review of the Orders of the Securities & Exchange Commission ordering the suspension of trading in Canadian Javelin Ltd. entered on Nov. 29, 1973; Sept. 5, 1974; Sept. 15, 1974; Sept. 25, 1974; Oct. 5, 1974; Oct. 15, 1974; Oct. 25, 1974; Nov. 4, 1974

s/ Samuel H. Sloan
Samuel H. Sloan

Petitioner pro se
120 Liberty Street
New York, N.Y. 10006
(212) 583-6437

TO: Securities & Exchange Commission
26 Federal Plaza
New York, N.Y.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 569—September Term, 1975.

(Argued February 19, 1976 Decided March 4, 1976.)

Docket No. 75-7283

SAMUEL H. SLOAN, SAMUEL H. SLOAN & Co.,

Plaintiffs-Appellants,

—against—

SECURITIES AND EXCHANGE COMMISSION, et al.,

Defendants-Appellees.

Before:

FEINBERG, OAKES and VAN GRAAFEILAND,

Circuit Judges.

Appeal from dismissal by United States District Court for the Southern District of New York, Thomas P. Griesa, *J.*, of complaint charging SEC and various others with numerous violations of the Constitution, the antitrust laws and other provisions of law.

Affirmed.

SAMUEL H. SLOAN, Pro Se, Lynchburg, Virginia, *for Appellants.*

MICHAEL J. STEWART, Assistant General Counsel, Securities and Exchange Commission, Washington, D.C. (David Ferber, Solicitor;

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Thomas L. Taylor III, Attorney, on the brief), *for Securities and Exchange Commission.*

NAOMI REICE BUCHWALD, Assistant United States Attorney (Thomas J. Cahill, United States Attorney for the Southern District of New York; Steven J. Glassman, Assistant United States Attorney, on the brief), *for United States of America.*

REX W. MIXON, JR., New York, N.Y. (Rogers & Wells, William F. Koegel, on the brief), *for National Quotation Bureau, Inc.*

ROBERT J. WOLDOW, Washington, D.C. (Jeffrey M. Silow, National Clearing Corporation; Lloyd J. Derrickson, National Association of Securities Dealers, Inc., Washington, D.C.; Breed, Abbott & Morgan, C. MacNeil Mitchell, New York, N.Y., on the brief), *for National Association of Securities Dealers, Inc., Bunker Ramo Corporation and National Clearing Corporation.*

PATRICIA ANNE WILLIAMS, New York, N.Y. (Willkie Farr & Gallagher, Michael B. Targoff, on the brief), *for Disclosure Inc.*

PER CURIAM:

Samuel H. Sloan appeals from a decision of the United States District Court for the Southern District of New York, Thomas P. Griesa, *J.*, dismissing his pro se complaint, which charged appellees with various violations

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of the Constitution and the antitrust and securities laws, as well as with several common law torts.[1]

Sloan, a securities broker-dealer, has had more than his share of litigation in this court. In January 1974, he was found to have violated rules of the Securities and Exchange Commission (SEC) relating to record-keeping and net capital, and was enjoined from further violations. *SEC* v. *Sloan*, 369 F. Supp. 996 (S.D.N.Y. 1974). His appeal from this order was dismissed by this court, *SEC* v. *Sloan*, Dkt. No. 74-1436 (2d Cir. Jan. 7, 1976), because Sloan was a fugitive from justice when the case came on to be heard, having apparently fled the jurisdiction to escape sentencing for contempt of a preliminary injunction restraining still further violations of SEC rules and requiring Sloan to permit SEC examination of his books and records. An appeal from this injunction was dismissed on the same day and on the same ground. *SEC* v. *Sloan*, Dkt. No. 75-7056 (2d Cir. Jan. 7, 1976).[2] Sloan's registration as a broker-dealer has been revoked by the SEC and he has been barred from association with any broker or dealer, Samuel H. Sloan, Securities Exchange Act Release No. 11376 (April 28, 1975), appeal docketed, *Sloan* v. *SEC*, Dkt. No. 75-4087, 2d Cir., May 7, 1975.[3]

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1 For simplicity, we have treated Samuel H. Sloan and Samuel H. Sloan & Co. as one plaintiff and one appellant. Appellees, in addition to the Securities and Exchange Commission, are the United States of America, National Quotation Bureau, Inc., Bunker Ramo Corporation, National Association of Securities Dealers, Inc., Disclosure Inc., and National Clearing Corporation.

2 A third Sloan appeal was also dismissed on that day, *SEC* v. *Canadian Javelin, Ltd.*, Dkt. No. 75-7046 (2d Cir. Jan. 7, 1976).

3 For other decisions arising out of Sloan's operations as a broker-dealer and the SEC's efforts to prevent his violations of its rules, see *Sloan* v. *Canadian Javelin, Ltd.*, Dkt. No. 75-7096 (2d Cir. Feb. 6, 1976); *Sloan* v. *SEC*, slip op. 213 (2d Cir. Oct. 15, 1975); *Sloan* v. *SEC*, Dkt. No. 75-4087 (2d Cir. June 12, 1975); *Sloan* v. *Ward*, Dkt. No. 75-3001 (2d Cir. Jan. 16, 1975).

In this action, Sloan mounts a massive though diffuse attack on the SEC and various private agencies in the securities industry. In effect, he challenges the legality of the entire structure of securities regulation in the United States. We agree with Judge Griesa that the attack is frivolous.

Count I of Sloan's lengthy complaint challenges the constitutionality of the Securities Exchange Act of 1934 and the rules and regulations promulgated under it. Sloan argues that the Act and rules constitute an unconstitutional delegation of legislative power; are overly vague; deprive him of liberty and property without due process of law; violate his right to contract; and exceed congressional power under the commerce clause. Some of these constitutional attacks on the authority of the SEC were raised by Sloan in this court on a previous occasion, and we then characterized his "blunderbuss attack" as "frivolous." *Sloan* v. *SEC*, slip op. 213, 215 (2d Cir. Oct. 15, 1975). We adhere to that view.

Count I also attacks a number of specific provisions of the regulatory scheme. For example, it charges that section 27 of the Act, 15 U.S.C. § 78aa, which vests in the federal courts exclusive jurisdiction of actions brought under the Act, is an unconstitutional interference with the jurisdiction of the state courts. But it has been established at least since *The Moses Taylor*, 71 U.S. (4 Wall) 411, 428-30 (1867), that Congress has the power to make federal jurisdiction exclusive. The other provisions of the Act and rules challenged by Sloan[4] are valid and reasonable exercises of congressional power under the commerce clause and the SEC's delegated regulatory power, which infringe no constitutional rights of plaintiff.

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4 Sections 12(g), 15(c)(5), 19(a)(4) of the Act, 15 U.S.C. §§ 78*l*(g), 78o(c)(5), 78s(a)(4), and Rules 15c2-11, 15c3-1, 17a-5, 17 C.F.R. §§ 240.15c2-11, 240.15c3-1, 240.17a-5.

The other main branch of Sloan's complaint is Count III, which charges the various non-governmental defendants with violations of the Sherman and Clayton Acts. But none of the actions charged constitute antitrust violations, essentially because they were taken pursuant to the scheme of securities regulation established by the Securities Exchange Act of 1934. See generally *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975); *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975).

We have also considered the other charges contained in the complaint and the various assignments of error made by Sloan on appeal,[5] and find no error in the dismissal of the complaint.

While we do not in this case invoke the provisions of Fed. R. App. P. 38 to assess penalties against appellant, we note that these are available, and may be appropriate if the same arguments which we have dismissed as frivolous are put before us again in the future.

The judgment of the district court is affirmed.

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5 Many of the points made in Sloan's brief bear little relation to the decision appealed from. For example, Sloan argues that the SEC "is a suable entity" and that the district court had jurisdiction, while the district court did not mention either problem. Sloan also argues, among other things, that a default judgment should have been entered against the United States, that certain attorneys should have been disqualified because they were not members of the bar of the Southern District, that the Securities Acts Amendments of 1975 require vacation of the judgment below, and that the district court erred in not entering a preliminary injunction. None of these arguments has merit.

Appendix F

United States of America
before the
Securities & Exchange Commission

In the
Matter of the
Application of

Samuel H. Sloan

VERIFIED PETITION FOR REVIEW

On the annexed affidavit Samuel H. Sloan sworn to the 5th day of March, 1976 the undersigned hereby petitions the United States Securities & Exchange Commission for review of all orders of the suspension of trading in Canadian Javelin Ltd. from November 29, 1973 up to and including such date as this petition may be decided. The petitioner demands a hearing and requests a declaration that each and every order of suspension of trading of Canadian Javelin Ltd. has been illegal and has deprived the petitioner of liberty and property without due process of law and that the Securities & Exchange Commission has violated the Securities Exchange Act of 1934 and has abused agency due process. The petitioner further demands an order declaring that there be no further suspensions of trading in the shares of Canadian Javelin Ltd. and that the current suspension in effect shall terminate.

Yours, etc.

s/ Samuel H. Sloan

Dated: March 5, 1976

Samuel H. Sloan
1761 Eastburn Avenue
Apartment A5
Bronx, New York 10457
(212) 299-2095

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United States of America
before the
Securities & Exchange Commission

In the
Matter of the
Application of
Samuel H. Sloan

AFFIDAVIT

State of New York)
) SS:.
County of New York)

Samuel H. Sloan, being duly sworn, deposes and says:

1. I make this affidavit in support of a petition for review of orders of suspension of trading in Canadian Javelin Ltd. Previously, I applied to the United States Court of Appeals for the Second Circuit for much the same relief. On October 15, 1975 the Court of Appeals dismissed my petition without prejudice because counsel for the Securities & Exchange Commission ("S.E.C.") indicated that the S.E.C. was willing to give me "some sort of hearing." Promptly thereafter, I applied to the S.E.C. for the hearing which had in effect been promised to me in the Court of Appeals decision. Approximately one month later I received a reply which indicated that the S.E.C. might give me a hearing if I were to submit an affidavit setting forth facts which I intended to prove at this hearing which would demonstrate that the S.E.C. had abused its discretion in suspending trading in Canadian Javelin Ltd. In my opinion this response indicates an intention contrary to that which

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is embodied in the Court of Appeals decision because it is obvious to me that when the Second Circuit stated in its opinion that it wanted an adequate factual record it meant that it wanted a record which would set forth the reasons for which the S.E.C. suspended trading in Canadian Javelin Ltd. and which would provide "substantial evidence" to demonstrate that those suspensions were justified. To this date, the S.E.C. has given no reason for its suspensions of trading in Canadian Javelin Ltd. and since I do not know why the S.E.C. persists in suspending trading in Canadian Javelin Ltd. I cannot disprove any "facts" upon which the suspensions are based. As I understand the Court of Appeals decision, the hearing which I have demanded should commence with testimony by the S.E.C. for the purpose of meeting the burden of proof which is properly on the S.E.C. to demonstrate that the suspensions of trading are legal. Only after cross examination of the S.E.C.'s witnesses will I be in a position to know why the S.E.C. has suspended trading in Canadian Javelin Ltd. in the first instance and only then will I be in a position to rebut this testimony.

2. In any event, regardless of what testimony might be given by witnesses for the S.E.C., it is clear that the suspensions are illegal and constitute an abuse of my due process rights. I am the owner of 13 shares of Canadian Javelin Ltd. In the past I engaged in substantial purchases and short sales of shares of Canadian Javelin Ltd particularly during 1973 prior to the November 29, 1973 suspension of trading. The Court of Appeals has already decided that because of these circumstances I am an aggrieved person and have standing to review the suspension orders in question. After the suspension of November 29, 1973 the S.E.C. proceeded to make successive ten day orders of suspension. Except for a three

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month period in early 1975, the S.E.C. has suspended trading in Canadian Javelin Ltd on a continuous basis and that suspension continues to be in effect until this day. This is clearly a violation of Section 12(k) of the Securities Exchange Act of 1934 (15 U.S.C. 78 1(k)) which gives the S.E.C. the power to suspend trading for not more than ten (10) days. Thus, the suspensions of trading are illegal regardless of what reason the S.E.C. may give to justify the suspensions.

3. Except for a brief period in late 1973, Canadian Javelin Ltd. has traded on a continuous basis on the Montreal Stock Exchange. Its present price is between $1.50 and $2.00 per share. Canadian Javelin Ltd. has approximately 12,000 stockholders who are citizens or residents of the United States. During the brief period in which it was allowed to trade in early 1975, Canadian Javelin Ltd. was frequently listed as one of the ten most actively traded securities on the American Stock Exchange. In spite of the trading suspensions Canadian Javelin Ltd. is to this date listed on the American Stock Exchange.

4. Canadian Javelin Ltd. has been mailing annual and quarterly earnings reports to all stockholders including myself on a regular basis. Prior to the 1973 suspension, Canadian Javelin Ltd. did not mail quarterly reports to its stockholders. Thus, Canadian Javelin Ltd. has provided more complete information to its stockholders when trading was suspended than it did prior to the suspension.

5. The most recent annual report issued by Canadian Javelin Ltd. contains an earnings statement and a balance sheet both of which are certified by the accounting firm Lee & Martin. The income statement shows that Canadian Javelin Ltd. had revenues of $7,619,330 during the year of 1974 and net income of $1,912,253 which amounts to $0.27

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per share on a fully diluted basis. The balance sheet shows that Canadian Javelin Ltd. has shareholders' equity of $47,242,117 which works out to a book value of $6.58 per share.

6. The six month earnings reports for 1975 shows revenues of $3,198,884, net income of $303,623 and a profit of $.04 per share. The nine months earnings report for the quarter ending September 30, 1976 shows revenues of $3,834,105 and a loss of $828,976 which amounts to $0.116 per share. The annual report for the year 1975 is not yet due.

7. From this and from other facts reported in the annual and quarterly reports of Canadian Javelin Ltd. and from documents filed with the S.E.C. it is apparent that Canadian Javelin Ltd. is a substantial company. Indeed, there appears to be no possible justification for the current series of suspensions. It appears, however, that officers of Canadian Javelin Ltd. have actively attempted to influence the S.E.C. in an effort to bring about the continued suspension of trading. In fact, when the S.E.C. stated in early January, 1975 that it was going to lift the trading suspension, counsel for Canadian Javelin Ltd. applied for and obtained from United States District Judge Lloyd F. MacMahon in *S.E.C. v. Canadian Javelin Ltd.*, S.D.N.Y. 74 Civil 5074 an order which temporarily restrained the S.E.C. from lifting its suspension of trading. The rationale for this order was that many United States residents hold their Canadian Javelin Ltd. shares in margin accounts and that if the suspension of trading were lifted abruptly, a disorderly market would develop and most of the margin holders would be forced to sell. At present, however, Canadian Javelin Ltd. is trading for a much lower price than it was even in January, 1975 and it is clear that margin holders, most of whom probably bought their stock at $10

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per share or higher, would now either be required to sell or to put up more margin. Under these circumstances, the price of Canadian Javelin Ltd. would almost certainly go down. This would explain why officers of Canadian Javelin Ltd. who own substantial shares of that corporation would go to the expense of retaining counsel in order to bring about the continued suspension of trading in Canadian Javelin Ltd.

8. However, at the same time I would like to make a substantial investment in Canadian Javelin Ltd. at current prices but am prohibited from doing so because of the suspension of trading. Clearly, I am being injured as are all other persons who wish to buy and sell shares of Canadian Javelin Ltd. as opposed to margin holders who wish to do neither. It appears that the only individuals who do not wish the shares of Canadian Javelin Ltd. to trade are officers and major stockholders of that corporation including principally John C. Doyle who is said to control Canadian Javelin Ltd. However, Mr. Doyle is not known to have been in the United States for about ten years and any shares owned by him are restricted or insider shares so it would appear that he would have no legal right to protest if the suspension of trading were lifted. It is ironic that by suspending trading in Canadian Javelin Ltd. the S.E.C. is aiding Mr. Doyle to the detriment of all United States stockholders of Canadian Javelin Ltd. Mr. Doyle has been accused many times of bribing government officials in Newfoundland and other places. This led former Canadian Prime Minister John Diefenbacher once to state: "Wherever John Doyle is, there is political fixing."

9. In the case of Canadian Javelin Ltd. every original suspension had occurred at a time when the price of the shares of Canadian Javelin Ltd. was dropping rapidly. In

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1971 trading was suspended when adverse publicity caused a drop in the price of Canadian Javelin Ltd. shares. In 1972 trading was again suspended when an unfavorable article in the Wall Street Journal caused an abrupt three point drop in the price of Canadian Javelin Ltd. The 1973 suspension occurred after an October 25, 1973 unfavorable Wall Street Journal article which led Canadian Javelin Ltd. to request an immediate halt of trading and this halt was still in effect at the time of the S.E.C. suspension. Finally, in 1975 the price of Canadian Javelin Ltd. dropped rapidly from 10-3/4 to about 5 just prior to the S.E.C. suspension. These facts and the underlying circumstances demonstrate that no suspension has occurred because of a market manipulation or because the price was too high but, to the contrary, the S.E.C. has suspended trading in Canadian Javelin Ltd. in order to aid a manipulation of the market. It should be noted that every time the S.E.C. has suspended trading the suspension has not been lifted until a date when the market for Canadian Javelin Ltd. shares on the Montreal Stock Exchange was strong and the price of these shares was subject to an immediate rise.

10. From these facts it is clear that the Canadian Javelin Ltd. suspensions have been timed in such a way as to cause benefit to John C. Doyle. This fact combined with a knowledge of Mr. Doyle's background has led me to the conclusion that in all probability Mr. Doyle is bribing a person or persons at the S.E.C. in order to bring about repeated suspensions of Canadian Javelin Ltd. I intend to develop facts at a hearing before the S.E.C. in an attempt to prove that this is the case. At this hearing it will be necessary to have the benefit of the testimony of those S.E.C. officials who are connected with the decision making process and therefore I request that I be given subpoena power if necessary to coerce this testimony.

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11. In this petition I incorporate by reference the legal arguments found in my brief filed with the Court of Appeals in *Sloan v. S.E.C.*, 74-2457. The requisite number of copies of this brief have already been filed with the S.E.C.

WHEREFORE, I demand that the relief requested in this position be granted.

s/ Samuel H. Sloan
Samuel H. Sloan

Sworn to before me this
5th day of March, 1976
s/ George R. Christ
GEORGE R. CHRIST
Notary Public, State of New York
No. 03-0631575
Qualified in Bronx County
Certificate filed in Bronx County
Commission Expires March 30, 1978

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1507

SAMUEL H. SLOAN, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-A to 4-A) is reported at 527 F.2d 11.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1975. A petition for rehearing was denied on January 21, 1976 (Pet. App. 5-A). The petition for a writ of certiorari was filed on April 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a person claiming to be aggrieved by orders of the Securities and Exchange Commission suspending trading for successive 10-day periods in the

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common stock of a corporation may obtain review in the court of appeals without first seeking relief from the Commission.

2. Whether the Commission is precluded from renewing a summary 10-day suspension.

3. Whether the foregoing issues have become moot because no order summarily suspending trading is any longer in effect.

STATUTES INVOLVED

Section 19(a) of the Securities Exchange Act of 1934, 48 Stat. 898, 15 U.S.C. 78s(a), in effect when the trading suspension orders were issued, provided in pertinent part:

> The Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors—
>
> * * * * *
>
> (4) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days.

When these orders were entered, Section 15(c)(5), 48 Stat. 895, as amended, 15 U.S.C. 78*o*(c)(5), provided:

> If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading, otherwise than on a national securities exchange, in any security (other than an exempted security) for a period not exceeding ten days. No broker or dealer shall make use of the mails or of any means or instrumentality

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> of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended.

In amendments to the Securities Exchange Act that became effective on June 4, 1975, the Commission's suspension powers were consolidated in a new Section 12(k) of the Act, Pub. L. 94-29, 89 Stat. 118, 15 U.S.C. 78*l*(k), which is the basis for each trading suspenison order issued since that date. The new Section 12(k) is set forth at Pet. 5.

STATEMENT

Petitioner sought review, in a court of appeals, of certain orders of the Securities and Exchange Commission that had summarily suspended trading in the common stock of Canadian Javelin, Limited ("CJL"). The petition for review challenged eight 10-day trading suspension orders that had been issued between November 29, 1973, and November 4, 1974 (Pet. App. 7-A). The court of appeals dismissed the petition, noting that the series of suspension orders continued only until January 26, 1975, and that when it heard argument a new series of suspension orders beginning on April 30, 1975, was in effect (Pet. App. 1-A to 2-A). The latter series of suspensions terminated on May 2, 1976, and no suspension order is now in effect.

Each of the Commission's orders issued during these periods suspended trading in CJL common stock for a period of 10 days, pursuant to statutory authority. Each of these trading suspensions was based upon an independent determination by the Commission that such suspensions were required in the public interest and for the protection of investors.

The court of appeals held that all of the claims in petitioner's "blunderbuss attack" were "frivolous," except for his contention that the Commission lacked the authority to issue successive 10-day suspensions for an indefinite period

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(Pet. App. 3-A).[1] The court of appeals stated, however, that it could not decide the merits of that claim "on the record before us," because petitioner's pleadings covered "only the *first* series of suspensions, which have now terminated" (*ibid.*; emphasis in original), and because the record was "unclear" with respect to the reasons for the second series of suspensions. After noting that petitioner might wish to challenge the second series of suspensions as well as the first, and that the Commission was "willing * * * to grant [petitioner] some sort of administrative hearing, thus satisfying any possible exhaustion [of remedies] requirement while also contributing to the record," the court of appeals dismissed the petition for review "without prejudice to [petitioner's] repleading after an administrative hearing * * * from which judicial review may be sought" (Pet. App. 3-A, 4-A; footnote omitted).[2]

On or about March 15, 1976, prior to termination of the second series of trading suspensions, petitioner filed a petition with the Commission seeking review of all of the suspensions of trading in CJL securities from November 29, 1973, up to and including the date that his petition might be decided. He asked, among other things, that the Commission refrain from issuing any further suspensions of trading in the shares of CJL common stock and that the Commission declare that the previous trading suspensions

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[1]On March 4, 1976, the court of appeals, affirming the district court's dismissal of a complaint filed by petitioner, which, "[i]n effect * * * [challenged] the entire structure of securities regulation in the United States," reiterated its view that petitioner's "blunderbuss attack" on the Commission's authority in the instant case is "frivolous." *Sloan* v. *Securities and Exchange Commission*, No. 75-7283, decided March 4, 1976 (see Pet. App. 11-A).

[2]On April 23, 1976, petitioner filed in the court of appeals a petition for review of the trading suspension orders comprising the second series of suspensions. *Samuel H. Sloan* v. *Securities and Exchange Commission*, No. 76-4110.

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were illegal. On April 21, 1976, after considering the matters contained in Mr. Sloan's petition, an affidavit submitted in support thereof, and the reasons for which the trading suspension orders had been issued, the Commission decided that the public interest and the protection of investors required it to suspend trading in CJL common stock for an additional 10 days. [3] Accordingly, trading was suspended from April 23, 1976, until May 2, 1976, when the second series of suspensions terminated.[4]

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[3]The Commission's notice reflecting its disposition (41 Fed. Reg. 17983-17984) is reproduced as Appendix A, *infra*, pp. 1a-3a. It explains that the first series of suspensions was based on the Commission's institution of a civil injunctive action, on November 29, 1973, alleging that CJL and certain of its principals had violated the federal securities laws in connection with the company's filing of false reports with the Commission and CJL's dissemination of "a series of press releases containing false and misleading information relating to its purported development of Panamanian mineral properties." With respect to the second series of suspensions then in effect, the Commission stated that it suspended trading "as a result of a lack of information concerning pending investigative action by Canadian regulatory authorities." In addition: (a) criminal informations returned in Canada indicated that CJL common stock "may have been artificially manipulated on two Canadian stock exchanges * * * "; (b) the Commission was "actively investigating, among other things, possible manipulation of the stock in the United States securities markets"; (c) private civil suits were pending in Canada concerning control of CJL and a Canadian provincial court had recently installed a new board of directors for the company; and (d) CJL had been delinquent, since March 31, 1976, "with respect to the filing of its 10-K report."

[4]On April 22, 1976, the Commission announced the adoption of informal procedures "by which any person adversely affected by a summary suspension pursuant to Section 12(k) of the Securities Exchange Act may obtain prompt consideration by the Commission of the reasons such person believes the continued suspension is not in the public interest or is not required for the protection of investors." Securities Exchange Act Release No. 12361, reproduced as Appendix B, *infra*, pp. 4a-5a. See also 41 Fed. Reg. 18290. Although the Commission announced the adoption of these procedures after announcing the disposition it had made of petitioner's petition, the criteria

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ARGUMENT

The important question whether the Securities and Exchange Commission has the statutory authority to order successive 10-day trading suspensions is, as the court of appeals held, not ripe for review. Nor is review necessary, for not only is there no conflict among the circuits, but there never has been a determination of that question by any court, including the court of appeals in this case. What is more, because no order suspending trading in the stock of CJL is now in effect, this case may be moot.

1. The court of appeals correctly held that, before petitioner may obtain review of Securities and Exchange Commission orders suspending trading, he must first present his arguments to the Commission (Pet. App. 4-A).[5] This Court has repeatedly held that judicial review must await completion of the administrative process.[6] The court of appeals found (Pet. App. 4-A) that petitioner's failure to have sought relief from the Commission resulted in an

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set forth in the Commission's release concerning the informal procedures were substantially followed in considering petitioner's objection to the CJL suspensions.

[5]At the time the petition for review was filed, Section 25(a) of the Securities Exchange Act, 48 Stat. 901, as amended, 15 U.S.C. 78y, provided:

> No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission.

The Act, as amended in June 1975, now provides (Section 25(c)(1), 89 Stat. 159):

> No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.

[6]See, *e.g.*, *Renegotiation Board* v. *Bannercraft Clothing, Inc.*, 415 U.S. 1, 20-25; *Securities and Exchange Commission* v. *Otis & Co.*, 338 U.S. 843.

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"insurmountably sparse" record for it to review. Although the Commission had not then announced any procedures for objections to be made to 10-day trading suspensions of securities—such objections rarely having been made—the Commission had not declined to consider objections; indeed, the Commission considered the objections subsequently made by petitioner.

2. In any event, petitioner's claim that the Commission cannot suspend trading for successive 10-day periods is incorrect.[7] When it enacted the Securities Exchange Act in 1934, Congress gave the Commission suspension power with respect to trading on national securities exchanges (Section 19(a)(4)), and the legislative judgment was reconfirmed in 1964 when this power was enlarged to reach trading in securities "otherwise than on a national securities exchange" (Section 15(c)(5)). These provisions were consolidated in amendments to the Securities Exchange Act that became effective in June 1975 (new Section 12(k), 89 Stat. 118).

Although these statutes do not expressly authorize the Commission to repeat the 10-day trading suspensions, Congress recognized that the Commission was so using its authority, and reenactment of the statute in light of this recognition is a strong indication that the power is consistent with the congressional will. When Congress expanded the Commission's authority in 1964 to embrace over-the-counter trading, the Senate Committee Report stated (S. Rep. No. 379, 88th Cong., 1st Sess. 66-67 (1963) (emphasis added)):

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[7] The availability of a prompt administrative hearing after suspension is begun, followed by prompt judicial review, satisfies the procedural requirements of the due process clause. See *Commissioner of Internal Revenue* v. *Shapiro*, No. 74-744, decided March 8, 1976, slip op. 14-18. See also Freedman, *Summary Action by Administrative Agencies*, 40 U. Chi. L. Rev. 1 (1972).

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> The Commission has consistently construed section 19(a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the ten-day period, it determines that another suspension is necessary. The committee *accepts this interpretation.* At the same time the committee recognizes that suspension of trading in a security is a drastic step and that prolonged suspension of trading may impose considerable hardship on stockholders. The committee therefore expects that the Commission will exercise this power with restraint and will proceed with all diligence to develop the necessary facts in order that any suspension can be terminated as soon as possible.

3. No order of the Commission suspending trading in CJL stock is now in effect. Whether or not the Commission might ever again suspend trading in CJL stock is purely a matter of conjecture, as is the question whether petitioner, if that event should occur, would again claim to be aggrieved. Cf. *Securities and Exchange Commission* v. *Medical Committee for Human Rights*, 404 U.S. 403, 406. Accordingly, this case probably is moot.[8]

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[8]Because each suspension lasts but 10 days, a challenge to a single suspension might survive the suspension's expiration if it raised issues "capable of repetition, yet evading review." *Weinstein* v. *Bradford*, 423 U.S. 147, 148-149; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498. The suspensions of CJL stock have aggregated lengthy periods, however. Petitioner's reluctance to present his complaint to the Commission in the first instance, not the short duration of the Commission's orders, has frustrated effective judicial review here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DAVID FERBER,
Solicitor to the Commission,

FREDERICK B. WADE,
Attorney,
Securities and Exchange Commission.

MAY 1976.

DOJ-1976-05

APPENDIX A

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

April 21, 1976

IN THE MATTER OF TRADING IN SECURITIES OF

CANADIAN JAVELIN LTD.

Securities Exchange Act of 1934 Section 12(k)

NOTICE OF SUSPENSION OF TRADING

On March 11, 1976, the Commission received a petition from Mr. Samuel H. Sloan seeking review of all of the suspensions of trading in Canadian Javelin Ltd. securities from November 29, 1973, to date. Mr. Sloan asked, among other things, that the Commission refrain from renewing the trading suspension of Canadian Javelin Ltd. and that the Commission declare that the previous trading suspensions were illegal.

Mr. Sloan states that he is the owner of 13 shares of Canadian Javelin Ltd., that in the past he has engaged in substantial purchases and short sales of shares of that stock, particularly during 1973 prior to a suspension of trading beginning on November 29, 1973.

On that date the Commission not only suspended trading of Canadian Javelin common stock, but also instituted a civil injunctive action against it and certain of its principals, charging violations of the registration and antifraud provisions of the Securities Act of 1933; of antifraud provisions of the Securities Exchange Act of 1934, as well as of annual and periodic reporting

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requirements of that Act. In addition, it was charged that false reports were filed with the Commission by Canadian Javelin Ltd. and that the company had disseminated a series of press releases containing false and misleading information relating to its purported development of Panamanian mineral properties. This resulted in a series of suspensions which concluded on January 26, 1975.

According to criminal informations returned in Canada, it appears that the common stock of Canadian Javelin may have been artificially manipulated on two Canadian stock exchanges, and that this was continuing after January 26, 1975. The Commission is actively investigating, among other things, possible manipulation of the stock in the United States securities markets. The Commission on April 29, 1975, again suspended trading as a result of a lack of information concerning pending investigative action by Canadian regulatory authorities.

In addition, a number of private civil suits are pending in Canada involving a dispute regarding control of the company. A Canadian provincial court recently issued an order installing a new board of directors and this order is now on appeal.

Mr. Sloan pointed out that the most recent annual report issued by by [*sic*] Canadian Javelin Ltd. contains an earnings statement and a balance sheet of Canadian Javelin Ltd., both of which are certified by the accounting firm of Lee & Martin. Since March 31, 1976, however, the company has been delinquent with respect to the filing of its 10-K report.

Mr. Sloan also contends that the trading suspension aids Mr. Doyle to the detriment of United States stockholders and concludes from this "that in all probability Mr. Doyle is bribing a person or persons at the SEC in order to bring about repeated suspensions of Canadian

Javelin Ltd." The facts he alleges in no way support this speculation.

Accordingly, it appearing to the Securities and Exchange Commission that the summary suspension of trading in the securities of Canadian Javelin Ltd. being traded on a national securities exchange or otherwise is required in the public interest and for the protection of investors;

THEREFORE, pursuant to Section 12(k) of the Securities Exchange Act of 1934, trading in such securities on a national securities exchange or otherwise is suspended, for the period from April 23, 1976, through May 2, 1976.

By the Commission.

/s/George A. Fitzsimmons
George A. Fitzsimmons
Secretary.

APPENDIX B

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

SECURITIES EXCHANGE ACT RELEASE NO. 12361/
April 22, 1976

SUMMARY SUSPENSIONS

The Securities and Exchange Commission today announced the adoption of procedures by which any person adversely affected by a summary suspension pursuant to Section 12(k) of the Securities Exchange Act may obtain prompt consideration by the Commission of the reasons such person believes the continued suspension is not in the public interest or is not required for the protection of investors. Section 12(k) authorizes the Commission summarily to suspend trading in securities for 10-day periods, if in its opinion the public interest or the protection of investors so requires.

The usual purpose of a suspension is to alert the investing public to the fact that there is insufficient public information about the issuer upon which an informed investment judgment can be made or that the market for the securities may be reacting to manipulative forces or deceptive practices. Consequently the primary issues normally to be considered by the Commission in determining whether or not 10-day suspensions should be instituted or renewed are whether or not there is sufficient public information upon which to base an informed investment decision or whether the market for the security appears to reflect manipulative or deceptive activites.

If any person adversely affected by such suspension or who would be adversely affected by the renewal of the suspension desires to show that such suspension is not

necessary in the public interest or for the protection of investors, he may petition the Commission that it not renew the suspension. Such petition, which may be in the form of a letter or other statement, should set forth with particularity the facts upon which petitioner relies and should be sworn to by the petitioner or an authorized officer of the petitioner.

If the petitioner so requests in the petition, and if upon examination of the petition the Commisssion is of the opinion that there is a genuine issue as to any material fact, the Commission will provide an opportunity for prompt presentation of all material facts. If no such opportunity is requested in the petition or if in the opinion of the Commission there is no genuine issue as to any material fact, the Commission will determine the issue upon the basis of the information contained in the petition and any other relevant facts known to the Commission.

The Commission will not be disposed to grant any such petition if the petitioner or any one affiliated with the petitioner shall fail to cooperate in supplying relevant information to the Commission or shall in any way obstruct any inquiry by the Commission into the relevant facts.

By the Commission.

/s/ George Fitzsimmons

George Fitzsimmons
Secretary